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In the

Supreme Court of the United States

October Term, 1958

RALPH L. WRIGHT,

Petitioner,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF HAMILTON COUNTY, FIRST APPELLATE DISTRICT OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF HAMILTON COUNTY, FIRST APPELLATE DISTRICT OF OHIO

To the Honorable The Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant a Writ of Certiorari to the Court of Appeals of Hamilton County, First Appellate District of Ohio, to review the judgment of that court which reversed a judgment on a jury verdict in favor of petitioner, the Supreme Court of Ohio having overruled a Motion to Certify the Record from said Court of Appeals. In this behalf, petitioner shows unto the Court:

OPINIONS BELOW

The decision of the Supreme Court of Ohio, wherein petitioner's Motion to Certify was overruled, is reported in Ohio Bar, advance sheets, issue of December 15, 1958, being 31 Ohio Bar, No. 37, at page 1085, said Motion to Certify having been overruled without opinion, by entry docketed December 17, 1958. The opinion of the Court of Appeals of Hamilton County, First Appellate District of Ohio reversing the judgment in favor of petitioner is reported in 152 N.E. (2d) 421, and is attached hereto as Appendix A (p. 2a, infra). The judgment entry of the Court of Common Pleas of Hamilton County, Ohio, in favor of petitioner, is attached hereto as Appendix B (p. 10a, infra).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The order of the Supreme Court of Ohio overruling petitioner's timely Motion to Certify was entered on December 17, 1958, and is set out in Appendix C (p. 10a, infra). The judgment of the Court of Appeals herein sought to be reviewed was dated and entered 30th day of June, 1958, and is shown at Appendix D, (p. 10a, infra).

The Supreme Court of Ohio by its refusal to consider this case through its overruling petitioner's Motion to Certify, made the Court of Appeals of Hamilton County, First Appellate District of Ohio, the highest court of the state in which a decision could be had in said cause, and the court to which the Writ of Certiorari from The Supreme Court of the United States should be directed in this case. *Western Union Telegraph Company* v. *Priester*, (1928) 276 U.S. 252, 72 L. Ed. 555, 48 S. Ct. 234; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, Comptroller of Public Accounts et al.*, (1954) 347 U.S. 159, 98 L. Ed. 583, 74 S. Ct. 396.

The statutory provision believed to confer jurisdiction on this Court to review the judgment below by Writ of Certiorari is the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U. S. Code, Sec. 1257 (3), providing that this Court may, by Writ of Certiorari, review any final judgment or decree rendered by the highest court of a state in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

In this cause the petitioner specially set up and claimed rights under statutes of the United States, namely, the Federal Employers' Liability Act. (Appendix E, p. 11a, infra), and the Federal Safety Appliance Act (Appendix F, p. 14a, infra), and the Boiler Inspection Act (Appendix G, p. 16a, infra).

QUESTIONS PRESENTED

Petitioner, a railroad employee, sued the respondent railroad under the Federal Employers' Liability Act and Federal Safety Appliance Act (including the Boiler Inspection Act) for injuries received when petitioner slipped on oil negligently left by respondent on the floor of the nose compartment of a diesel locomotive, while he was procuring, under directions of his superior, a replacement part for a coupler which had broken and separated due to repeated emergency stops caused by defective brakes while the train was moving in interstate commerce.

1. May a state appellate court take away the jury verdict awarded petitioner in such case by ruling that under the law of that state, taken from common law negligence and industrial injury cases, the violations by respondent of the Safety Appliance Act, in operating a train with

a defective coupler which broke or with defective brakes were, as a matter of law, not a legally sufficient cause of petitioner's injuries for which respondent could be held liable, contrary to decisions of this Court in Federal Employers' Liability Act and Safety Appliance Act cases.

2. Under the circumstances of Question No. 1, has the state appellate court usurped the functions of the jury in Federal Employers' Liability Act and Federal Safety Appliance Act cases, by substituting for the jury verdict its own opinions and conclusions concerning the causal relationship between the undisputed violations of the Federal Safety Appliance Act and the injuries suffered by the employee?

3. Was the petitioner entitled to have submitted to the jury all the facts of the accident, the defective operation of the train brakes, the breaking and separation of the coupler, the necessity of repairing the coupling mechanism, the obtaining of the necessary replacement part, the slipping on the oil, so that the jury could consider all these facts and circumstances in determining whether the respondent had been negligent, and whether the violations of the Federal Safety Appliance Act caused injury to the petitioner?

STATUTES INVOLVED

The statutes involved are:

Federal Employers' Liability Act, 45 U.S. Code, Sections 51, 53, 54, 56, 58 (Appendix E, p. 11a, infra)

Federal Safety Appliance Act, 45 U.S. Code, Sec. 1, 2, 7, 13 (Appendix F, p. 14a, infra)

The Boiler Inspection Act, 45 U.S. Code, Sec. 23 (Appendix G, p. 16a, infra)

STATEMENT OF THE CASE

It was admitted from the outset that petitioner and respondent were at all times herein mentioned engaged in interstate commerce and were subject to the Federal Employers' Liability Act, the Federal Safety Appliance Act, and the Boiler Inspection Act.

Petitioner was a fireman employed by respondent. The train, upon which petitioner was a fireman, moved northward toward Danville, Kentucky, and, repeatedly upon service application of brakes, because they were defective, went into emergency stopping power. (R. 12, 32, 57, 259, 260)[1]. At King's Mountain, upon a service application of the train brakes, the train again went into emergency stopping power. (R. 12, 27, 261). Because of the strain of the repeated use of emergency stopping power, a knuckle, a component of the coupler, broke apart, and the train separated. (R. 51). The conductor, after sending petitioner on an unsuccessful mission to obtain the proper repair part from a passing train, instructed the petitioner to obtain a standard AAR knuckle from the nose compartment of the diesel engine and throw it off. (R. 17, 28, 55, 262). There was no dispute on the evidence as to any of the foregoing. Petitioner, having received these instructions by radio from the conductor, entered the nose compartment of the diesel, and while engaged in securing the knuckle and throwing it off, slipped on oil negligently left by respondent on the floor of the diesel and injured his back. There was a conflict in the testimony pertaining to the condition of the nose of the diesel. Petitioner's evidence was that it was littered with supplies, chain, journal packings, grease buckets and oil on the floor, and that it was unlighted. (R. 68, 69, 81).

[1] Record references are to page numbers of the typewritten Bill of Exceptions, filed in this Court as part of the record below, no part of the same having been printed below.

There was other testimony, by an official of the respondent, that the compartment was clean.

As there was no dispute as to the defective condition of the brakes or as to the breaking of the coupler or as to petitioner's throwing off the replacement knuckle from the diesel under instructions from his superior, the case was tried upon the issues of (1) the respondent's negligence with respect to the condition of the nose of the diesel (a violation of the Boiler Inspection Act) (2) whether either of admitted violations of the Federal Safety Appliance Act, i.e. having defective brakes and a coupler which broke, was a proximate cause of petitioner's injuries, and (3) the extent of petitioner's injuries and the amount of his damages.

The Trial Court submitted the case to the jury under a special written charge and general instructions which permitted the jury to determine whether the violations of the Safety Appliance Act in operating a train with defective brakes and a coupler which broke, or either of them, was a proximate cause of petitioner's injuries, as well as the contested issues of negligence of the respondent in permitting the litter and oil to be in the unlighted nose of the diesel, and of course the amount of petitioner's damages. The jury returned a general verdict in favor of the petitioner and assessed his damages in the sum of Thirty Two Thousand ($32,000.00) Dollars.

The Trial Court accepted the verdict of the jury and entered judgment thereon. Thereafter respondent's motion for a new trial was overruled. The respondent appealed to the Court of Appeals of Hamilton County, First Appellate District of Ohio, on six grounds of error, which court reversed the judgment for petitioner solely on the one ground that the trial court erred in giving special charge No. 1 (Appendix H, p. 17a, infra) and in using language in the general charge, both of which permitted the jury to determine whether the admitted viola-

tions of the Federal Safety Appliance Act were a "proximate cause" of Petitioner's injuries. Petitioner filed a timely Motion to Certify to the Supreme Court of Ohio, which motion was overruled.

Form and Manner in Which the Federal Questions Sought to be Reviewed Here Were Raised Below

Federal questions herein raised were raised at the outset of the case by the pleadings in the state court as petitioner's suit was specifically brought under the Federal Employers' Liability Act and the Federal Safety Appliance Act. The questions of proper definition of proximate cause and the function of the jury in determining the same under these federal statutes and decisions of this Court were raised in the presentation of evidence, the special charge given at petitioner's request by the trial court, referred to above, and the language of the general charge referred to above. These same questions were the principal matters argued and briefed by petitioner in the Court of Appeals of Hamilton County, Ohio, and their determination (erroneously we contend) was the sole basis of the reversal by that court of petitioner's verdict. In his Motion to Certify to the Supreme Court of Ohio, petitioner urged that the Court of Appeals had erred in interpreting those same federal statutes, and had done so in a manner contrary to controlling decisions of this Court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The state court below decided federal questions of substance in a way contrary to the applicable decisions of this Court, in that the state court: (1) in interpreting the

Federal Safety Appliance Act and Federal Employers' Liability Act, applied a narrow and restricted definition and rule of proximate cause taken from Ohio negligence and industrial injury cases, (2) usurped the functions of the jury and substituted its own opinion for that of the jury's determination of the causal relation between undisputed violations of the Federal Safety Appliance Act and petitioner's injury, and (3) denied petitioner the right of trial by jury on petitioner's claims that his injury was caused by violations of the Federal Safety Appliance Act and Federal Employers' Liability Act.

This Court has been assiduous to enforce the rights of injured railroad workers under the federal statutes, and has said early and late that this Court is the final judge of the facts and law in these railroad cases. The Federal Employers' Liability Act and Federal Safety Appliance Act are federal laws. They must be uniform in their application throughout the land and in their interpretation in all courts, whether state or federal. To permit various state courts to apply those laws in their own fashion and at variance with the decisions of this Court is to destroy the laws, to destroy the intent of Congress in passing the laws, and to destroy the very paramountcy of this Court on federal questions. To permit the decision below to stand unchallenged is to permit an erosion of federal rights which have vested, by permitting an unpermissible, narrow and niggardly interpretation of these great humanitarian statutes.

Questions of construction of these two federal Acts of nationwide importance are among the most important decisions for final determination by the Supreme Court of the United States, and amply justify the granting of a Writ of Certiorari.

As this Court said in *Rogers* v. *Missouri Pacific R. Co.*, (1957) 352 U.S. 500 (509) 1 L. ed. 2(d) 493 (501); 77 S. Ct. 443, 450:

> "Cognizant of the duty to effectuate the intention of Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction."

See also: concurring opinion of Mr. Justice Douglas in *Wilkerson* v. *McCarthy*, (1949) 336 U.S. 53 (70), 93 L. ed 497 (509), 69 S. Ct. 413, 422; *Arnold* v. *Panhandle and Santa Fe R. Co.* (1957) 353 U.S. 360 (361), 1 L. ed. (2d) 889 (891), 77 S. Ct. 840, 841.

ARGUMENT AMPLIFYING REASON RELIED ON FOR ALLOWANCE OF THE WRIT

I.

The Decision Below Improperly Restricted Liability For Violations of the Federal Safety Appliance Act and too Narrowly Limited the Character of the Required Causal Relation Between Such Violations and Petitioner's Injuries Necessary for Recovery, Contrary to the Decisions of This Court in the Following Cases:

Carter v. *Atlanta and St. Andrews Bay R. Co.*, (1949) 338 U.S. 430, 94 L. ed. 236, 70 S. Ct. 426;

Rogers v. *Missouri Pacific R. Co.*, (1957) 352 U.S. 500, 1 L. ed. (2d) 493, 71 S. Ct. 443;

Affolder v. *N.Y.C. & St. Louis R. Co.*, (1950) 339 U.S. 96, 94 L. ed. 683, 70 S. Ct. 509;

Kernan v. *American Dredging Co.*, (1958) 355 U.S. 426 (432-433), 2 L. Ed. 2d 382, 78 S. Ct. 394;

Coray v. *Southern Pacific Co.*, (1949) 335 U.S. 520 (523-524), 93 L. ed. 208, 69 S. Ct. 275.

The court below erroneously believed it was obliged in the present case to follow Ohio negligence and industrial injury law, defining and restricting "proximate cause". Instead of following this Court's decisions in applicable cases, such as those above cited and many others, it decided to follow an Ohio Industrial Commission case (*McNees* v. *Street Railway Company*, 152 O.S. 269) to support its conclusion.

The court below held that the breaking and separating of the coupler was a mere "philosophic" or "sylogistic" cause but not the efficient, or direct cause of petitioner's injuries, and that the immediate cause (such as oil on the floor) of the petitioner's slipping on the floor of the diesel

while procuring the replacement knuckle was the only legal "proximate cause" of petitioner's injuries for which respondent could be held liable. The court below said (Appendix A, p. 4a, infra):

> "As we view the facts in this case, the injuries to plaintiff were occasioned by what happened in the nose of the diesel engine. If the defendant is to be held liable, in this case, it must result from the failure of some duty, if any, it owed to the plaintiff in the use of the compartment in the nose of the diesel. * * * *It is true that if the coupler had not broken, plaintiff might not have been injured.* * * * Where a cause is patently remote, the court should not leave it to the jury to decide otherwise. There must be a proximate cause; the violation of the Federal Act *must directly and proximately cause the injuries; its violation must be the real cause, or the cause, without which, the injuries would not have occurred.*" (Emphasis added.)

It was exactly that type of language by the Missouri court which caused that court to be reversed in *Rogers, supra*, when this Court said at 352 U.S. 500 (506):

> "The Missouri court's opinion implies its view that this is the governing standard by saying that the proof must show that 'injury would not have occurred but for the negligence' of his employer, and that the 'test of whether there is causal connection is that, absent the negligent act the injury would not have occurred'. *That is the language of proximate causation* which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the *sole, efficient, producing* cause of injury.
>
> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that the employer's negligence played *any part, even the slightest* in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on

grounds of probability, attribute the result to other causes, including the employee's contributory negligence". (Emphasis added.)

In *Carter, supra,* a switchman was injured when a coupler did not work, causing an L & N car to run loose down the tracks, and the switchman, in order to stop it, ran after it, jumped on it, and applied the handbrake; and while on the then stopped car was injured by wood on it which toppled on him when the car was bumped by the backing train. The Court of Appeals had affirmed a directed verdict against the injured switchman on the ground that the failure to couple was "the remote, not the proximate, cause of defendant's injuries." This Court reversed and said at 338 U.S. 430 (434):

> "But respondent contends that when the L & N car came to rest after the failure of the coupler 'its capacity for doing harm was spent'. The second movement, it argues, in which the coupling worked perfectly, started a new chain of events resulting in Carter's injury.
>
> "We cannot agree that the events were so divisible. This was a two-prong complaint, alleging the right to recover under the Safety Appliance Act and the Federal Employers' Liability Act. In this situation the test of causal relation stated in the Employers' Liability Act is applicable, the violation of the Safety Appliance Act supplying the wrongful act necessary to ground liability under the F.E.L.A. • • •
>
> "Once the violation is established, only causal relation is in issue. And Congress has directed liability if the injury resulted 'in whole or in part' from its negligence or its violation of the Safety Appliance Act."

In *Coray, supra,* the decedent was following some distance behind a moving train on a motor track car and was not looking ahead. The train ahead suddenly stopped

because of an air line leak in violation of the Safety Appliance Act. The motor track car crashed into the rear of the train, killing the decedent. The Utah Supreme Court affirmed a directed verdict for the defendant, on the ground that the violation of the Safety Appliance Act was not the proximate cause of the decedent's death, making a distinction between cause "in the philosophic sense" and "proximate cause" in a legal sense. This Court reversed, stating at 335 U.S. 520 (524):

> The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectic subtleties can serve no useful interpretive purpose.

In the light of the repeated pronouncements of this Court in the above cited and other decisions, it is not permissible in Federal Employers' Liability Act and the Federal Safety Appliance Act cases to apply common law negligence rules and definitions of proximate cause to determine liability. This Court's decisions make it plain that the causal relation between the wrongful act and the injuries suffered need not be so direct or proximate that the wrongful act is the sole, efficient or immediate cause of the injuries, but liability may still flow from the wrongful act so long as it "played any part, even the slightest", in producing the injuries, and this is so, even though other more immediate, efficient and stronger causes intervene thereafter to have a greater effect on producing the injuries.

This was forcibly recognized in *St. Louis Southwestern R. Co.* v. *Ferguson*, 182 F. (2d) 949 (1950 CA 8) a case in which an employee while trying to repair a broken coupler was knocked down by cars being switched, where the Court ruled that whether a violation of the Safety

Appliance Act is a cause of the injury is for the jury to determine, saying at p. 952:

> "and as to causal relationship, the court in such case equally has no right to direct a verdict on legalistic refinements between remote and immediate causation."

The Court of Appeals in *Eaglaer v. Scandrett, et al.*, 151 F. (2d) 562 (1945, CA 7) well summarized the change in conception of the degree of causality required from common law negligence cases to Federal Employers' Liability cases, when it said at pp. 565-566:

> "It (F.E.L.A.) provides that if the railroad's negligence *'in part'* results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been the direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now if the negligence of the railroad has *'causal relation'* -- if the injury or death resulted *'in part'* from the defendant's negligence, there is liability."
>
> "The words *'in part'* have enlarged the field or scope of proximate causes in these railroad injury cases. These words suggest there may be a plurality of causes, each of which is sufficient to permit a jury to assess liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident."

Moreover, the court below was in error in concluding that the breaking of the coupler and knuckle was only a remote cause. It was not, in logic, a remote cause, but was actually the sole efficient and immediate cause for petitioner's having to go into the nose of the diesel to get

the replacement knuckle and throw it off. It was in truth a "cause without which the injury would not have occurred." The only purpose for petitioner's obtaining and throwing off the replacement knuckle was to repair the broken coupler, and the breaking of the coupler was the only reason that necessitated his action.

The state court with specious logic equated mere passive necessary conditions precedent with antecedent causes which actively produce and are the moving forces which effect the result. Thus the state court said (Appendix A, p. 4a, infra):

> "It is true that if the coupler had not broken plaintiff might not have been injured. Socrates could well have reasoned that if plaintiff had not been given a job with defendant, he would not have been injured."

Plaintiff's being given his job with the defendant, just like his getting out of bed the morning of his injury, were mere passive conditions precedent, among hundreds and possibly thousands of others, necessary to have made it possible for him to have been where he was when he was injured, *but they had no effect in influencing his action of procuring the replacement knuckle.* The broken coupler, i.e. the violation of the Safety Appliance Act, was, however, the efficient and immediate cause by reason of which he was required (he was so ordered) to do the act which produced his injuries.

The failure of the coupler to work in the case at bar was no less a "proximate" cause than failure of the coupler in *Carter, supra*, the failure of the airline and defective brakes in *Coray, supra*, the failure of the coupler in *Affolder, supra*, the failure of the coupler in *O'Donnell* v. *Elgin J. N. E. R. Co.*, (1949) 338 U.S. 384, 94 L. ed. 187, 70 S. Ct. 200, or the failure of the air hose in *New York, N. H. & H. R. Co.* v. *Leary*, 204 F. (2d) 461, (1953 CA 1) (Cert. Den. 346 U.S. 856, 98 L. ed. 370, 74 S.

Ct. 71) where a conductor fell off a trestle while bringing a replacement part (for defective air hose which had broken) from the engine back to the place where the hose had broken.

One of the reasons the state court misstated the law was that it assumed erroneously that respondent's liability was dependent upon foreseeability of the exact manner in which petitioner suffered his injuries from the breaking of the coupler. It said (p. 6a, infra):

> "Secondly, should the defendant be charged with anticipating that if a coupler broke and one of its employees had occasion to enter the nose of the diesel he might meet with an accident of the kind described by the plaintiff? We think not."

Lack of foreseeability of the kind of accident or injury caused (even if only in part) by the negligence of the railroad or by violation of the Safety Appliance Act does not diminish the railroad's liability to its employees. This was made plain in *Kernan supra*, and is apparent from *Rogers, Carter, Coray, Affolder* and *O'Donnell*, all cited above. This was likewise so in the federal Court of Appeals cases *supra, Eglsaer* v. *Scandrett*, and *N. Y., N. H. & Hartford R. Co.* v. *Leary*, the latter of which was almost identical on the facts to the case at bar. Foreseeability, as such, is the language of negligence law. It has no applicability in a case where a violation of the Safety Appliance Act is, in the least, a cause of injury.

Furthermore, the state court's statement as to lack of foreseeability is unjustified. It was certainly foreseeable that if a coupler broke, needing a replacement knuckle, some employee would be sent to procure one, and if such spare knuckles were kept in the nose compartment of the diesel, that the employee would be sent there to procure the replacement knuckle. It was therefore plainly foreseeable that if such nose compartment were left unlighted

and cluttered up with oil on the floor, a broken coupler might very well cause such an employee to slip on the oil and be injured as was petitioner in procuring a repair part.

Because the state court unduly restricted the degree of causal relation between the violation of the Safety Appliance Act (the broken coupler) and petitioner's injuries necessary to place liability on respondent, contrary to the applicable decisions of this Court, it is submitted that the Writ should issue.

II.

The State Court Usurped The Functions of The Jury and Deprived Petitioner of His Right to Trial by Jury on Petitioner's Claim That His Injuries Were Caused by Respondent's Violation of The Federal Safety Appliance Act.

It was the function of the jury to determine whether or not the violations of the Safety Appliance Act by the respondent in operating a train with defective brakes and with a coupler that broke, which violations necessitated the obtaining of the repair knuckle by petitioner, contributed "in whole or in part" or "played any part, even the slightest, in producing the injury."

This Court has held on numerous occasions that it is for the jury, not an appellate court, to determine within reason whether negligence of the railroad or a violation of the Safety Appliance Act "played any part even the slightest in producing the injury", and to determine whether a sufficient causal relation existed between the act complained of and the injury. Thus in *Tennant v. Peoria, Ill. R. Co.*, (1944) 321 U.S. 29, 88 L. Ed. 520, 521, 64 S. Ct. 409 this Court held:

> "What is a proximate cause of an injury ordinarily is a jury question to be determined as a fact in view of

> the circumstances attending it and the finding of a jury on that question must be allowed to stand *unless all reasonable men exercising an unprejudiced judgment* would draw an opposite conclusion". (Emphasis added.)

and later in the same case at 321 U. S. 29 (35):

> "The conclusion of the jury whether it relates to negligence, *causation* or any other factual matter cannot be ignored. Courts are not free to reweigh evidence and set aside jury verdicts, merely because different inferences or conclusions can be drawn, or judges feel other results are more reasonable." (Emphasis added.)

Again in *Lavender* v. *Kern*, (1946) 327 U.S. 645, 653, 90 L. Ed. 917, 923, 66 S. Ct. 740:

> "The function of the Appellate Court ceases when *any evidentiary* basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel another conclusion to be more reasonable."

To similar effect, *Ellis* v. *Union Pacific R.R. Co.* (1947) 329 U.S. 649, 653, 91 L. Ed. 572, 576, 67 S. Ct. 598; *Wilkerson* v. *McCarthy*, (1943) 336 U.S. 53; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 68, 87 L. Ed. 610, 618, 63 S. Ct. 444; *O'Donnell* v. *Elgin J. N. & E. R. Co.*, (1949) 338 U.S. 384, 386; *Myers* v. *Reading R.R. Co.*, (1947) 331 U.S. 477, 91 L. Ed. 615, 67 S. Ct. 1334. As very recently stated in *Rogers* v. *Missouri Pacific Railway Co.*, *supra*, at 352 U.S. 500 (507):

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities".

In the instant case, the Ohio Appellate Court attempted on the issue of causation to distinguish this case from other decided cases where the employee was seeking the source of trouble at the time of the injury or was in the process of attempting the repair of the defective part and received injuries in so doing. So far as causation is concerned under the Federal Employers' Liability Act and the functions of the jury to determine the same, there is no difference between an injury which occurs while looking for or repairing a defect and an injury which occurs while securing a repair part. Petitioner was just as much engaged in repair or in remedial operations at the time of his injuries as were the successful plaintiffs in the many cited cases.

Regardless of nomenclature it was the jury's function to make the choice between any permissible inferences and to determine whether the violations of the Federal Safety Appliance Act "played any part, even the slightest, in producing petitioner's injuries". The state appellate court, in setting aside petitioner's verdict, usurped the jury's function and deprived petitioner of his right to trial by jury.

PRAYER

For the foregoing reasons, petitioner prays that a Writ of Certiorari issue directed to the Court of Appeals of Hamilton County, First Appellate District of Ohio, in this case, to the end that the judgment of that court may be reviewed by this Court and reversed with directions that the judgment of the trial court be affirmed.

Respectfully submitted,

OTTO F. PUTNICK,
JEROME GOLDMAN,
Attorneys for Petitioner.

APPENDIX A

OPINION OF COURT OF APPEALS

Hamilton County, No. 8429

LONG, J.

This is an appeal on questions of law from a judgment of the Court of Common Pleas of Hamilton County, wherein the plaintiff recovered a judgment of $32,000.00 against defendant.

As briefly as they can be stated, the facts are: that plaintiff was employed by defendant as a fireman at the time of the injuries, of which he complains. The defendant operated a train in interstate commerce, and, of course, is amenable to the Federal Employers' Liability Act (45 U. S. C. A. #51, et seq.). The train on which plaintiff was working was proceeding north through Tennessee; as it approached King's Mountain, the Engineer received a block signal, necessitating the bringing of the train to a sudden stop; as a result of which a knuckle on a coupler of one of the cars, some forty cars to the rear, was broken; in some manner this interfered with the brake pressure; thereupon, the train "was parted" at the point of the broken knuckle. Then it was, that the conductor, who was in charge of the defendant's train, ordered the plaintiff to go forward and flag a southbound train, which was about due at King's Mountain, for the purpose of securing a new knuckle; plainti succeeded in boarding the southbound train in conformity to a radio message from the conductor of the train on which plaintiff was riding; this knuckle from the southbound train was thrown off at the place where the northbound train was parted; plaintiff jumped off the engine of the southbound train and mounted the diesel engine of his own train; at this point

plaintiff sat in the cab of the engine and talked to his engineer for about seven or eight minutes. It was discovered that the knuckle thrown off by the southbound train would not fit and the conductor ordered the plaintiff to try the knuckles contained in the nose of the diesel of their own train; plaintiff entered this compartment of the diesel of their own train; plaintiff entered this compartment of the diesel, which, he testified, was littered with supplies, knuckles, knuckle pins, a big chain, dope buckets and waste material saturated with oil; he further testified that there was oil on the floor and that the nose compartment was not lighted; that he found a knuckle which would fit; that as he was throwing the knuckle out of the door of the nose compartment, his body twisted and he slipped and fell, causing the injuries about which he complains.

Plaintiff, in his petition, alleges among other things that the operation of the train with a defective coupler constitutes a violation of the Federal Safety Appliance Act; that said violation amounts to negligence as a matter of law, and that as a result, he is entitled to recover damages for the injuries so sustained.

Defendant admits that under the Federal Act, the breaking of the coupler amounts to negligence, but says that such negligence was not the proximate cause of the injuries to the plaintiff. It is upon this point that the parties are violently opposed.

Defendant raises six assignments of error, and it is with the first three that this court is concerned.

Defendant claims that all of the evidence from the breaking of the coupler to the entrance of the plaintiff into the nose of the diesel was irrelevant and inadmissible, for the reason that there is no causal connection between such evidence and the injuries of the plaintiff. Considering this evidence most favorably in favor of the plaintiff,

it has, at least, historical value only, for the purpose of showing the sequence of events leading up to the plaintiff's entering the nose of the diesel. We hold, therefore, that it was admissible in evidence.

Coming to the second assignment of error, namely, that the court erred in construing Section 2317.52 of the Revised Code, this Court agrees that the legislature might have been more specific in what it intended. However, considering this section in connection with the sections which permit cross-examination by an adverse party, Section 2317.52, Revised Code, should be construed to mean, not that anybody who is an agent or works for an adverse party may be called as if on cross-examination. The statute says that "when the action • • • relations to • • • a transaction or occurrence in which it has been shown or it is admitted that the adverse party acted either in whole or in part through an agent • • •". To this Court, this language means, that to be called as if on cross-examination, it must appear that the agent has some knowledge of a fact or facts, which is, or are relevant to the transaction or occurrence which gives rise to the action or proceeding. While we think that we have stated the meaning of the statute, we admit that its application will be attended with difficulty. However, this is not the fault of the Courts. As we interpret Section 2317.52 Revised Code, the conductor of the train on which the plaintiff was riding certainly had knowledge of many of the facts having to do with the "occurrence" leading up to the time of plaintiff's injuries; he, therefore, was subject, under the statute, to cross-examination on those matters.

We now come to that part of the third assignment of error, wherein it is claimed that the trial court erred in giving (a) charge No. 1, requested by plaintiff; and (b) that part of the general charge dealing with the applicability of the Federal Safety Appliance Act. Since both these

claims have to do with the proximate cause, we shall discuss them together.

In the special charge No. 1, requested by the plaintiff and given by the court, the court instructed the jury that if they found by a preponderence of the evidence that plaintiff's injuries were proximately caused, in whole or in part, by the defective brakes and the failure of the coupling device to remain coupled, then their verdict must be for the plaintiff. In his general charge, the trial court used similar language in defining the applicability of the Federal Safety Appliance Act. In our opinion, this constitutes reversible error. As we view the facts in this case, the injuries to plaintiff were occasioned by what happened in the nose of the diesel engine. If the defendant is to be held liable in this case, it must result from the failure of some duty, if any, it owed to the plaintiff in his use of the compartment in the nose of the diesel. The breaking of the coupler had nothing to do with plaintiff's injuries. While the Federal Act seems to make a violation of its provisions negligence per se, yet a person injured thereby has the duty of showing that such violation is the proximate cause of his injuries. Mere incidents in the chain of events causing injuries resulting from violation of the Federal Act can not be the basis for compensation. In our opinion, the confusion arises in cases of this kind from the fact that the law does not recognize the philosophic in determining cause. It is true that if the coupler had not broken, plaintiff might not have been injured. Socrates could well have reasoned that if plaintiff had not been given a job with defendant, he would not have been injured. Suppose plaintiff was injured when he jumped off the southbound train, could it be said that the breaking of the coupler was the proximate cause of his injuries; what if the train had pulled into Cincinnati, and plaintiff was taking the broken knuckle to the round house to have it fixed, and while

there he stumbled into a pit? Is there no limit to the incidents which might arise resulting from the broken coupler, for which liability might attach to the Railroad? Syllogistic deductions can in no case be substituted for legal cause. Such deductions may be too remote. Where a cause is patently remote, the Court should not leave it to a jury to decide otherwise. There must be a proximate cause; the violation of the Federal Act must directly and proximately cause the injuries; its violation must be the real cause, or the cause, without which, the injuries would not have occurred.

There is no question about the law on this subject of proximate cause. It is the application of the rule which causes the difficulty. Even though the Federal Act practically makes the Railroad Company an insurer against the failure of a coupling device, yet the decisions are to the effect that such failure must have a causal connection between it and any injuries for which liability is claimed against the Railroad Company.

In the case at bar, the evidence is clear that after the failure of the coupler, the plaintiff alighted from his train, flagged a southbound train, mounted the cab of the diesel of the latter train; dismounted therefrom; mounted his train again, and sat talking for seven or eight minutes with his engineer. In the language of one of the cases, he had "arrived at a place of safety" in the chain of sequence, resulting from the breaking of the coupler. It was then that he entered the nose of the diesel on his train; a new chain of events was in the making; it was the result of the condition of, and situation in this latter compartment, combined with his act of throwing out the knuckle, that was the efficient cause of his injuries. How could such an event become a link in an unbroken chain of events, which the Railroad Company should reasonably anticipate might result? In Brady v. Southern R. R. Co., 320

U. S. 476 this very question was decided in favor of the Railroad Company. Many cases have been cited by both parties to this suit, some of those in favor of the plaintiff, and cited by appellee, are cases where the plaintiff, an employee of the Railroad Company, was seeking the source of the trouble at the time or was in the process of attempting a repair of a defective part and received injuries in so doing. This is a very different situation from the one we have in the case at bar. In all of the cases cited by appellee, the courts point out that the injured employee was subjected to hazards of bad weather, faulty roads, or unperceived conditions of the premises. In all these cases, the question before the court was "just what danger or risk is created by the defective equipment?" New York, New Haven & Hartford R. R. Co. v. Leary, 204 Fed (2d) 461, decided May 14, 1953.

What dangers or risks were presented in the case at bar as the result of the defective coupler? Flagging the southbound train and jumping off the same might have presented some risk or danger, but these events are too remote to be considered proximate causes; was there any danger or risk in going into the nose of the diesel and slipping on an oily floor while throwing out a knuckle? In the first place we cannot conceive of this performance as a risk or danger. Secondly, should the defendant be charged with anticipating that if a coupler broke and one of its employees had occasion to enter the nose of the diesel, he might meet with an accident of the kind described by the plaintiff? We think not. In all of the Federal cases, without exception, violation of the Federal Safety Appliance Act must be the proximate cause to establish liability.

Likewise, we are not without authority in Ohio on this question of proximate cause. In the case of McNees v. Street Ry. Co., 152 Ohio St., 269, the decedent's widow

was claiming death benefits from the Industrial Commission, because her husband was "subjected to unusual physical and nervous strain through the necessity of driving his bus through an exraordinarily heavy fog." The sixth paragraph of the syllabus in that case is: "An injury does not arise out of the employment within the meaning of the Workman's Compensation Act, unless there is a proximate causal relationship between the employment and the injury."

Prior to the decision in the McNees case, the Supreme Court seemed to indicate that a mere finding of a causal connection between the employment and the injury was sufficient to sustain a finding against the Industrial Commission. (Judge Taft's opinion, page 275).

However, in the McNees case, the Supreme Court now requires more than a cause. Remote cause is not sufficient. The seventh paragraph of the syllabus in that case is: "Even where there is substantial evidence tending to prove that the employment was a probable cause of the injury, such evidence will not require a finding, as a matter of law, that there was a proximate causal relationship between the employment and the injury where there is other substantial evidence tending to prove that something apart from the employment could have caused the injury."

Having concluded that the breaking or the failure of the coupler could not have been the proximate cause of plaintiff's injuries, we find that the giving of Special Charge No. 1, requested by the plaintiff, and the Court's general charge with reference to the applicability of the Federal Safety Appliance Act, constitute reversible error.

We find no other errors apparent upon the record.

The judgment of the Court of Common Pleas is reversed and the cause is remanded to that court for a new trial and further proceedings according to law.

HILDEBRANT, P. J., CONCURS.

MATTHEWS, J., Concurring.

I have no difficulty in concurring in the reversal of this judgment, for the reasons set forth in the opinion of the Court, but my doubts r[illegible]te to the order remanding the case for a new trial. M[illegible] first thought was that the final judgment should be rendered.

In the opinion of the Court, this explanation is made of the circumstances surrounding the plaintiff-appellee's injuries:

> "As he was throwing the knuckle out of the door of the nose compartment, his body twisted and he slipped and fell, causing the injuries about which he complains."

No other person was in the compartment at the time. No employee of the defendant-appellant was present at that time, and no employee had done any act theretofore that in any way had anything to do with the action of the plaintiff-appellee in throwing the knuckle, or in twsting his body, or in slipping or falling.

However, it is true that there was evidence that there was oil on the floor of the compartment; and that there was evidence that the lighting was insufficient, but there is very little, if any, evidence that these conditions had anything to do with his twisting, or slipping, or falling.

Furthermore, the plaintiff-appellee knew all about the condition of this compartment when he entered it to get the knuckle.

It is true that by Section 54 of U. S. C. A., it is provided that:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this Act (Sections 51-60 of this title) to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the

risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

But that section does not make the common carrier an insurer of the safety of the employee while he is in and about the business of the carrier. There must be some fault attributable to the employer as a basis of liability.

The only possible fault that the record shows on the part of the employer is in allowing the floor to become "saturated" with oil. And it is that circumstance that cause me, with many doubts, to concur in remanding this case for a new trial.

It is certainly not clear that the condition of the floor had anything to do with the slipping by the plaintiff. Perhaps, an inference might be drawn that it did.

The plaintiff described the conditon of the floor of the nose compartment, and, perhaps, an inference might be drawn that the employer was responsible for that condition, and, on account of the fact that it was widespread the carrier was negligent in failing to remedy it within a reasonable time.

While entertaining these doubts, I have concluded to concur in reversing the judgment and remanding the case for a new trial, at which these doubts may be resolved one way or the other.

APPENDIX B

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS Hamilton County, Ohio

The jury having returned its verdict for the plaintiff in this action and having assessed his damages in the sum of Thirty-two thousand ($32,000.00) Dollars, it is ordered that judgment be and is hereby rendered in conformity to such verdict, and that plaintiff recover of the defendant the said sum of Thirty-two thousand ($32,000.00) Dollars, his costs herein and interest for which judgment is hereby rendered.

APPENDIX C

ENTRY ON MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS OF HAMILTON COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

(Duly certified).

APPENDIX D

JUDGMENT ENTRY OF REVERSAL IN THE COURT OF APPEALS AND REMANDING CAUSE FOR FURTHER PROCEEDINGS.

This day this cause came on to be heard upon appeal on questions of law, original papers, assignments of error, bill of exceptions, transcript of the docket and journal entries in the Court of Common Pleas of Hamilton County,

Ohio, and briefs; and, was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid there is error manifest upon the face of the record to the prejudice of the Appellant in this, to-wit:

In the giving of Special Charge No. 1 requested by Plaintiff-Appellee; and, the General Charge as to the applicability of the Federal Safety Appliance Act.

It is therefore considered, ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Hamilton County be, and the same hereby is, reversed and held for naught, and that the cause be remanded to the Court of Common Pleas for further proceedings according to law, costs on this appeal to abide the final determination of the cause.

To all of which Plaintiff-Appellee, by counsel, excepts.

APPENDIX E

FEDERAL EMPLOYERS' LIABILITY ACT

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal

representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

§ 54. Assumption of risks of employment

That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 56. Actions; limitation; concurrent jurisdiction of courts; removal of case in State court

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404.

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress. Apr. 22, 1908, c. 149, § 8, 35 Stat. 66.

APPENDIX F

FEDERAL SAFETY APPLIANCE ACT

§ 1. Driving-wheel brakes and appliances for operating train-brake system

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. Mar. 2, 1893, c. 196, § 1, 27 Stat. 531.

§ 2. Automatic couplers

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. Mar. 2, 1893, c. 196, § 2, 27 Stat. 531.

§ 7. Assumption of risks by employees

Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provision of sections 1-7 of this title shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge. Mar. 2, 1893, c. 196, § 8, 27 Stat. 532.

§ 13. Penalty for using car not equipped as provided; hauling car for repairs where equipment becomes defective; liability for death or injury of employee; use of chains instead of drawbars

Any common carrier subject to this chapter using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of sections 1-16 of this title not equipped as provided in sections 11-16 of this title, shall be liable to a penalty of $100 for each and every such violation, to be recovered as provided in section 6 of this title: *Provided*, That where any car shall have been properly equipped, as provided in sections 11-16 of this title, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this title, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the

death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this chapter; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain livestock or "perishable" freight. Apr. 14, 1910, c. 160, § 4, 36 Stat. 299.

APPENDIX G

BOILER INSPECTION ACT

§ 23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, § 2, 36 Stat. 913; Mar. 4, 1915, c. 169, § 1, 38 Stat. 1192; June 7, 1924, c. 355, § 2, 43 Stat. 659.

APPENDIX H

SPECIAL CHARGE NO. 1

The Court instructs the jury that if you find from a preponderance of evidence that on the occasion described therein the brakes of the train did not operate properly and thereby were defective, and that as a result of the operation of the brakes a knuckle, in an automatic coupling device between two cars in the train, broke and the coupling device failed to remain coupled,

And if you further find from a preponderance of the evidence that the plaintiff, Ralph Wright, in the course and scope of his duties, to assist in the repair and coupling device by replacement of the broken knuckle attempted to move a knuckle from the engine nose compartment,

And if you further find from a preponderance of the evidence that the plaintiff, Ralph Wright, sustained injury in so attempting to move the knuckle and that such injury was the proximate result in whole or in part of the defective brakes and of the failure of the coupling device to remain coupled,

Then the Court instructs the jury that the Plaintiff, Ralph Wright, is entitled to prevail and your verdict must be in favor of the plaintiff, Ralph Wright, and against the defendant, the Cincinnati, New Orleans and Texas Pacific Railway Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 737

RALPH L. WRIGHT,

Petitioner,

v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

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Cincinnati, Ohio

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 737

RALPH D. WRIGHT,

Petitioner,

v.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

The Writ should not be allowed, because the "Questions Presented," "Statement of Case," "How Federal Question Is Presented," and the "Reasons for Granting the Writ," as set out in Petitioner's Brief are incomplete and inaccurate and furnish no ground for allowance of certiorari. In particular, not disclosed therein is the fact that the judgment of the Court of Appeals of Ohio, sought to be reviewed, remanded the cause to the Court of Common Pleas of Hamilton County, Ohio for a new trial, *and is therefore a non-final judgment.* Further, the decision of the Supreme Court of Ohio denying Petitioner's motion to certify was general, without any specification of ground on which the decision rested, and since the record con-

tained both federal and non-federal questions, it presumably was based on tenable non-federal grounds, and, hence, will not be reviewed by this Court.

In the event, however, this Court concurs in Petitioner's position, Respondent should be permitted to present to the Supreme Court of Ohio the non-federal assignments of error urged by it in the Court of Appeals, but not considered or passed on by the Supreme Court of Ohio because of the requirements of Ohio Statutes and Rules of Practice of the Supreme Court of Ohio.

QUESTIONS

I.

Where, in an action based in part on the violation of the Federal Safety Appliance Act and brought under the Federal Employers' Liability Act, the Plaintiff fails to adduce probative facts to show a causal relationship between the violation and the injury, and, therefore, reasonable minds could not reasonably differ on the question of proximate causation, it is error for the Trial Court to charge the jury on the applicability of the Federal Safety Appliance Act.

II.

Where, in an action based in part on the violation of the Federal Safety Appliance Act and brought under the Federal Employers' Liability Act, it is proven that the railroad violated the Federal Safety Appliance Act, it is not then *automatically* required that the question of proximate causation be submitted to the jury.

III.

Where, in an action based in part on the violation of the Federal Safety Appliance Act and brought under the Federal Employers' Liability Act, the Plaintiff fails to

adduce probative facts to show a causal relationship between the violation of the Federal Safety Appliance Act and the injury, and therefore, reasonable minds could not reasonably differ on the question of proximate causation, and where the trial judge nevertheless charges the jury on the applicability of the Federal Safety Appliance Act, the Court of Appeals of the State of Ohio has the *duty* to correct this error by reversing and remanding for a new trial.

IV.

This Court will not grant certiorari where the Ohio Court of Appeals reverses the decision of the Trial Court and remands for new trial, since the decision of the Ohio Court of Appeals sought to be reviewed is a non-final judgment.

V.

Where, the Supreme Court of Ohio overrules a Motion to Certify without specifying the ground(s) for its decision, this Court will not grant certiorari because it must be presumed that the Supreme Court of Ohio based its decision on tenable nonfederal ground(s) present in the record.

STATEMENT

Petitioner's "Statement of the Case" fails to set forth vital facts, which facts demonstrate that the instant case is *not* one calling for allowance of a Writ. For the sake of brevity, we shall supplement Petitioner's "Statement of the Case," rather than re-state that which appears therein.

Respondent's train was travelling northwardly through Kentucky. A knuckle broke, causing a parting of the train about 40 cars back from the engine (R. 12). Petitioner,

a fireman, alighted from his position in the diesel engine, went forward along the track and flagged a southbound freight train on the adjoining tracks and climbed into the cab of the southbound train (R. 41). While there, the conductor of Respondent's train radioed to the engine of the southbound train and told the engineer that he had knuckle trouble about 40 car lengths from his own engine, and asked the southbound man to move his train forward and drop off a replacement knuckle where Respondent's train was parted (R. 52).

Petitioner rode the southbound train back to his own engine, jumped off, and climbed back into his own diesel engine and *sat talking with his engineer for 7 or 8 minutes.* The conductor then radioed them that the knuckle thrown off by the southbound train would not fit, and instructed Petitioner to get a knuckle out of the nose compartment of his diesel engine, throw it off on the side of the track and light a fusee by it (R. 53).

It was this extended lapse of time between the alleged violation of the Federal Safety Appliance Act and the Petitioner's entering the nose compartment of the engine to secure a replacement knuckle, which formed the basis of the Opinion of the Ohio Court of Appeals, First Appellate District (Pet. App. A, p. 5a) in reversing and remanding:

> "In the case at bar, the evidence is clear that after the failure of the coupler, the plaintiff alighted from his train, flagged a southbound train, mounted the cab of the diesel of the latter train; dismounded therefrom; mounted his train again, and sat talking for seven or eight minutes with his engineer. In the language of one of the cases, he had 'arrived at a place of safety' in the chain of sequence, resulting from the breaking of the coupler. It was then that he entered the nose of the diesel on his train; a new chain of events was in the making; it was the result of the condition of, and situation in this latter compartment,

combined with his act of throwing out the knuckle, that was the efficient cause of his injuries. . . . *Brady* v. *Southern R. R. Co.*, 320 U. S. 476; . . . *New York, New Haven & Hartford R.R. Co.* v. *Leary*, 204 Fed. (2d) 461."

After the Trial Court (Court of Common Pleas of Hamilton County, Ohio) had entered judgment on the verdict for Plaintiff (Petitioner herein), the Defendant (Respondent) appealed to the Ohio Court of Appeals, First Appellate District, alleging six Assignments of Error, viz:

1. The Court erred in admitting certain evidence objected to by Defendant-Appellant;

2. The Court erred in construing Ohio Revised Code §2317.52 in permitting a witness to be called under the said Statute and cross-examined as agent in charge of Defendant-Appellant.

3. The Court erred in granting Special Charge No. 1 and in its general charge to the jury re the applicability of the Federal Safety Appliance Act.

4. The Court erred in its charge to the jury in answer to the jury's inquiry as to the affect of income tax on a verdict.

5. The verdict is excessive, appearing to have been given under the influence of passion and prejudice.

6. The verdict is not sustained by sufficient evidence, is against the manifest weight of the evidence, and is contrary to law.

Only Assignment of Error No. 3 involved a Federal question; the other five Assignments being questions of purely State law and procedure. Each of these Assignments of Error was argued by Counsel for the parties in written briefs filed in the Court of Appeals, as well as in oral argument.

The Court of Appeals, basing its decision solely on Assignment of Error No. 3, held (Pet. App. A, p. 7a):

> "... we find that the giving of Special Charge No. 1 requested by the plaintiff, and the Court's general charge with reference to the applicability of the Federal Safety Appliance Act, constitutes reversible error.
>
> "We find no other errors apparent upon the record.
>
> "The judgment of the Court of Common Pleas is reversed and the cause is remanded to that court for a new trial and further proceedings according to law."

It must be remembered that Plaintiff (Petitioner) in his Amended Petition actually sought recovery on but two theories:

(1) that the Defendant (Respondent) violated the Federal Safety Appliance Act and as a "direct and proximate" result thereof the Plaintiff was injured;

(2) that the Defendant failed to provide Plaintiff with a safe place to work and as a "direct and proximate" result thereof the Plaintiff was injured.

Both of these issues were submitted by the Trial Court to the jury. The Court of Appeals reversed, finding that there was insufficient evidence of a proximate relationship between the violation of the Federal Safety Appliance Act and the injury of the Plaintiff, *remanding the cause for a new trial wherein the Plaintiff would still have the opportunity to recover on the basis of the alleged "unsafe place to work."*

From the judgment of the Court of Appeals, Plaintiff (Petitioner) filed a Motion to Certify in the Ohio Supreme Court. Whereupon, the entire record in the case (including Defendant's six Assignments of Error in the Court of Appeals and Briefs of both parties in the Court of Appeals) was before the Supreme Court of Ohio for review in passing on the propriety of the Plaintiff's Motion to Certify. The Ohio Supreme Court overruled said Motion, stating:

"It is ordered by the Court that this motion be, and the same hereby is, overruled" (Pet. App. C, p. 10a).

The Ohio Supreme Court's entry overruling the Motion to Certify does not reflect the ground on which the Motion was overruled. It must be presumed then, that the overruling was based on the conclusion that no error had intervened by reason of the judgment of the Court of Appeals to reverse and remand and that the case was not one "of public or great general interest" under Ohio Constitution, Article V, Section 2. Since five of the six Assignments of Error filed by Defendant (Respondent) in the Court of Appeals were unquestionably based on non-federal grounds, and any one of these could have been the basis of the Ohio Supreme Court's decision to overrule the Motion to Certify (hence refusing to alter the decision of the Court of Appeals remanding the cause to the Trial Court for a new trial), it must, therefore, be presumed that the decision overruling the Motion to Certify rested on non-federal ground(s), and is not reviewable by this Court.

Should this Court determine, however, that the Supreme Court of Ohio's decision overruling the Motion to Certify amounted, in effect, to an affirmance of the Court of Appeal's decision by reinstating the judgment of said Court, and that the overruling of the Motion *was necessarily based solely* on the federal question (which we do not believe to be true), it is obvious that the effect of such holding would be to *deprive Respondent of the possible benefit of the five non-federal issues.*

This is true, because in Ohio, an Appellee (Respondent in the Supreme Court of Ohio) is permitted to file its Assignments of Error in the Supreme Court of Ohio without filing a cross appeal. In support of its Motion to Certify, Petitioner alleged three Assignments of Error (i.e. essentially that the Court of Appeals misconstrued the

Federal Safety Appliance Act and the Federal Employers' Liability Act).

The Supreme Court of Ohio overruled this Motion. As a result, Respondent did not have the opportunity to file a brief on the merits. The Rules of Practice of the Supreme Court of Ohio provide that an Appellee may *include in its brief ON THE MERITS its assignment of errors*, and may argue same with supporting authorities in the brief on the merits. Rule II Section 2(B) of the Rules of Practice provide:

> "... appellee may include in his brief his assignments of error, if any, as provided in Section 2505.22 of the Revised Code."

Ohio Revised Code § *2505.22* provides in part:

> "Assignments of error may be filed on behalf of an appellee *which shall be passed upon by a reviewing court before a judgment or order is reversed in whole or in part.*" (Emphasis added.)

Since the Supreme Court of Ohio overruled Petitioner's (Appellant there) Motion to Certify, Respondent (Appellee) never was presented with the opportunity to file its Assignments of Error (see Rule II Section 2(B), *supra*) and since that Court did not "reverse in whole or in part" the judgment of the Court of Appeals (See *R. C.* § *2505.2*- *supra*) the Supreme Court of Ohio could not have passed on any Assignments of Error of Respondent, even if we (prematurely) had filed Assignments of Error.

Out of caution, and recognizing that this Court *may* grant the Writ and accept Petitioner's argument on the merits, we submit that this Court should in such case permit Respondent to "have its day in court" before the Ohio Supreme Court on the five non-federal, local questions of

law present in the case, but not yet, because of Ohio's rule, presented or decided by the Supreme Court of Ohio.

We believe, however, that this question will be unnecessary to decide, inasmuch as there are three dispositive reasons why the Writ should not and will not be allowed:

1. The decisions of the Court of Appeals of Ohio and the Supreme Court of Ohio are not in violation of the decisions of this Court. The evidence clearly showed that the violation of the Federal Safety Appliance Act played *no part* in the injury of the Plainitff.

2. The judgment of the Court of Appeals remanded this cause to the Trial Court for a new trial. This Court will not grant Certiorari where the judgment sought to be reviewed is a *non-final judgment*.

3. The Ohio Supreme Court, in overruling Plaintiff's (Petitioner's) Motion to Certify, did not state the ground on which it reached its decision. The record contained both federal and non-federal questions. It must, therefore, be presumed that the overruling of the Motion rested on non-federal ground(s) and hence will not be reviewed by this Court.

ARGUMENT

I. The Plaintiff Failed to Adduce Probative Facts to Show Any Causal Relationship Between the Violation of the Federal Safety Appliance Act and the Injury; Therefore, Since Reasonable Minds Could Not Reasonably Differ on the Question of Causation, the Decision of the Court of Appeals of Ohio Reversing the Judgment of the Court of Common Pleas of Ohio and Remanding to that Court for a New Trial, Properly Corrected the Prejudicial Error Committed by the Trial Court in Charging the Jury on the Applicability of the Federal Safety Appliance Act.

Despite the trend of recent Federal Employer's Liability Act decisions in this Court, it is still the law that the

recovery which is permitted under the act clearly is limited to those injuries which are *proximately caused, in whole or in part*, by the violation of the Federal Safety Appliance Act.

Davis v. *Wolfe*, 263 U. S. 239, 86 L. Ed. 284, 44 S. Ct. 64 (1923);
Dobson v. *Grand Trunk Western Railroad Co.*, 7th Cir., 248 F. (2d) 545, at 547 (1957);
Chesapeake and Ohio Railway Company v. *Burton*, 4th Cir., 217 F. (2d) 471 at 473 (1954);
Tiller v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444 (1943);
Brady v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 239, 64 S. Ct. 232 (1943);
Texas & Pacific Ry. Co. v. *Thomson*, 5th Cir., 232 F. (2d) 313 (1956);
Fleming v. *Kellett*, 10th Cir., 167 F. (2d) 265 (1948);
Reynolds v. *Atlantic Coast Line R. Co.*, 5th Cir., 196 F. (2d) 643 (1952);
Cusson v. *Canadian Pac. Ry. Co.*, 2d Cir., 115 F. (2d) 430 (1940);
New York, New Haven & Hartford R.R. Co. v. *Leary*, 204 F. (2d) 461 (1953) (*Cert. denied* 346 U. S. 856, 98 L. Ed. 370, 74 S. Ct. 71);
Johnson v. *Chicago Great Western Ry. Co.*, 64 N. W. (2d) 372 (1954);

Viewing the evidence in the instant case most strongly in favor of the Petitioner, it is impossible to stretch the facts far enough to allow a reasonable person to find *any* direct causal relation between the breaking of the coupler and the Petitioner's injury. That this Court has gone far in liberally construing the Federal Employers' Liability Act is well known; yet, as shown by the above cited authorities, this Act is still predicated upon deep-rooted and settled principles of negligence law. Thus, the requirement that there be a direct proximate causal relationship between the negligence and the injury *is still* the law, albeit

that negligence need but "play any part, even the slightest, in producing the injury."

To find that there is an effective causal relation in the instant case, and to submit this to the jury, is to do utter violence to the oft-repeated phrase that the "railroad is not an insurer of the safety of its employees under the Federal Employers' Liability Act." Wherein did the breaking of the coupler directly contribute "in whole or in part" to the injuries of the Plaintiff? He suffered no injuries when the train came to a sudden stop. He suffered no injuries when he left the diesel engine and went forward to flag the southbound train. He suffered no injuries when he climbed into the southbound engine nor when he later alighted therefrom. He suffered no injuries when he climbed back into his own engine, nor *while he sat talking to the engineer for an addtional seven or eight minutes.* If the Plaintiff had somehow suffered an accident during any of this time, as he moved from one place to another, could this be said to have been the proximate result of the breaking of the coupler? During this protracted interval, a crew member of the *southbound train* threw off a replacement knuckle to assist in repairing the coupler. If this crew member had injured himself in so doing, are we to stretch the Act so far as to say that his injury would also be proximately caused by the breaking of the coupler?

If Plaintiff had been struck by a bolt of lightning while he sat talking to the engineer, would this too be proximately caused by the defective coupler?

We submit that the breaking of the coupler was *not* the proximate cause in whole or in part, of the subsequent injury of the Plaintiff. While, it is true that "*but for*" the breaking of the coupler, the situation would not have arisen which activated the Plaintiff to go into the nose compartment to secure the replacement knuckle, no case

has gone so far as to permit "*but for*" to constitute the touchstone of recovery.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 239, 64 S. Ct. 232 (1943);
Reetz v. *Chicago & E. R. Co.*, 46 F. (2d) 50, 6th Cir. (1931);
Central of Georgia Ry. Co. v. *A. R. Clark*, 95 Ga. App. 325, 98 S. E. (2d) 85 (1957);
Johnson v. *Chicago Great Western Ry. Co.*, Minn. Sup. Ct. 64 N. W. (2d) 372 (1954);
Chesapeake & Ohio Ry. Co. v. *Burton*, 4th Cir., 217 F. (2d) 471 (1954).

In the *Brady* case, *supra*, the facts were:

Plaintiff's decedent, a brakeman, assisting in a switching movement, was thrown from the step of a gondola car to instant death when the trucks of the car hit "the wrong end" of a closed derailer on the east rail of the switch track. The opposite (west) rail of the switch track was defective. Plaintiff, among other theories, sought recovery based on the defective condition of the west rail opposite the derailer, permitting the car to rise over the "wrong end of the derailer." The jury returned a verdict for the Plaintiff for $20,000. *The Supreme Court of North Carolina reversed and the United States Supreme Court affirmed the reversal, holding there was insufficient evidence of proximate causation to justify submitting the case to the jury.*

At page 479 of the *Brady* decision, Mr. Justice Reed stated:

> "The weight of the evidence under the Employers' Liability Act *must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. Western & Atlantic R. Co.* v. *Hughes, supra; Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 524, Cf. *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Commissioners* v. *Clark*, 94 U. S. 278, 284.

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. *Galloway* v. *United States*, 319 U. S. 372; *Pence* v. *United States*, 316 U. S. 332; *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, n. 1; *Anderson* v. *Smith*, 266 U. S. 439; *Coughran* v. *Bigelow*, 164 U. S. 301, 307; *Gunning* v. *Cooley*, 281 U. S. 90, 93, note; *Seaboard* v. *Padgett*, 236 U. S. 668, 673; *Parks* v. *Ross*, 11 How. 362, 373. See IX Wigmore on Evidence, 3d ed., 1940, §§ 2494 et seq."

and at page 483:

> "Such evidence, we assume, would justify a finding for petitioners, if the defective rail was the proximate cause of the derailment and the backing of the train improperly over the closed derailer a danger reasonably to be anticipated. . . . *The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. . . . Bare possibility is not sufficient.* Milwaukee & *St. Paul Ry. Co.* v. *Kellog*, 94 U. S. 469, at 475:
>
> "'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' *Events too remote to require reasonable prevision need not be anticipated. . . . The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.*" (Emphasis added.)

Petitioner argues in his Brief (page 16) that foreseeability has no place in the instant case and that the Court of Appeals of Ohio erred in basing its decision on lack of foreseeability. The cases show that foreseeability is the test, and that Petitioner's contention is erroneous.

See *Texas and Pacific Ry. Co.* v. *Thomson*, 232 F. (2d) 313, 5th Cir. (1956) wherein the *Brady* case is approved and followed.

Chesapeake and Ohio Ry. Co. v. *Thomas*, 198 F. (2d) 783, 4th Cir. (1952) *Certiorari denied*, 344 U. S. 921 (1953).

Fleming v. *Kellett*, 167 F. (2d) 265, 10th Cir. (1948), at page 267:

> "Question remains whether the negligence was 'in whole or in part' the cause of the injury. Otherwise stated, the negligent conduct of the Railroad must be a 'substantial factor' in bringing about the harm. Restatement Torts § 431."

Fore v. *Southern Ry. Co.*, 178 F. (2d) 349, 4th Cir. (1949).

Reynolds v. *Atlantic Coast Line R. Co.*, 5th Cir., 196 F. (2d) 643 (1952), (*Cert. denied* 346 U. S. 856, 98 L. Ed. 370, 74 S. Ct. 71) at 646:

> "Under the Federal Employers' Liability Act the basis of recovery is negligence, not mere injury, and the negligence must be the proximate cause of the injury. In order to find that negligence is the proximate cause of an injury 'it must appear that the injury was the natural and probable consequence of the negligence or wrongful act and that it ought to have been foreseen in the light of the attending circumstances.'"

New York, New Haven & Hartford R. Co. v. *Leary*, 204 F. (2d) 461, 1st Cir. (1953), at 466:

> "*Brady* v. *Southern Ry. Co.* (*supra*) is our guide and the issue before us is just what danger or risk is created by a defective air brake." (*Certiorari denied*, 346 U. S. 856, 98 L. Ed. 370, 74 S. Ct. 71.)

See also, Judge Learned Hand's discussion of foreseeability in Federal Employers' Liability Act cases in *Cusson* v. *Canadian Pac. Ry. Co.*, 2d Cir., 115 F. (2d) 430 at 432 (1940).

Petitioner seems not only to question the propriety of the Appellate Court's decision, but also the very *authority* of the Appellate Court *to review*. Despite the liberality with which the Federal Employers' Liabiltiy Act and Federal Safety Appliance Act are administered, State courts, nevertheless, have retained their inherent and statutory powers to review and if errors be found, it is their *duty* to correct the errors by means of reversal and remand. This proposition is aptly stated in *Chesapeake and Ohio Ry. Co.* v. *Thomas*, 4th Cir., 198 F. (2d) 783 (1952), at page 788:

> "We are all aware of the line of cases decided by the Supreme Court on the functions of the court and the jury under the F. E. L. A., and the proposition they establish that an appellate court must not take cases out of the jury's hands, or uphold such action, where any reasonable basis whatever for submission is revealed by the evidence (citing cases). *But this does not mean that such an appellate function is eliminated under the Act, or that reversal is not justified upon 'a complete absence of probative facts to support the conclusion reached.'* (*Lavender* v. *Kurn*, 327 U. S. 645, at 653; and other cases cited). *To allow such a question as is here involved to reach the jury would be to mask a wisp of suspicion with the cloak of hard fact.*" (Emphasis added.)

(This case was *denied certiorari*; see 344 U. S. 921, 1953.)

II. The Judgment of the Court of Appeals of Ohio Remanded This Cause to the Court of Common Pleas for a New Trial; Therefore, This Court Will Not Grant Certiorari to Review the Judgment of the Court of Appeals Because It Is a Non-Final Judgment.

From the adverse verdict in the trial court, Respondent appealed to the Court of Appeals of Ohio, which court ruled (Pet. App. A, p. 7a):

> "The judgment of the Court of Common Pleas is reversed and the cause is remanded to that court for a new trial and further proceedings according to law."

The Ohio Supreme Court having overruled Petitioner's Motion to Certify, the status of the case is such that (if the instant Writ is denied) a new trial must be held in the Trial Court. Thus, there is not here involved a "final judgment or decree" within the meaning and requirement of 28 U. S. C. § 1257, 62 Stat. 929.

American Construction Co. v. *Jacksonville, T. & K. Ry. Co.*, 148 U. S. 372, 384, 37 L. Ed. 486, 13 S. Ct. 758 (1892).

Gospel Army v. *City of Los Angeles, Calif.*, 331 U. S. 543, 91 L. Ed. 1662, 67 S. Ct. 1428 (1947);

Market St. Ry. Co. v. R.R. Comm. of Calif., 324 U. S. 548, 89 L. Ed. 1171, 65 S. Ct. 770 (1945), rehearing denied 324 U. S. 890, 89 L. Ed. 1438, 65 S. Ct. 1020;

South Pac. Ry. Co. v. *Gileo*, 351 U. S. 493, 100 L. Ed. 1357, 76 S. Ct. 952 (1956).

III. The Decision of the Ohio Supreme Court Overruling Petitioner's Motion to Certify Was General and Presumably Was Based on an Arguable Non-Federal Ground in the Record. This Being True, a Petition for Writ of Certiorari Upon a Federal Ground Included in the Issues Will Not Be Entertained.

The Supreme Court of Ohio does not assign reasons for allowance or disallowance of Motions to Certify. In this case, there is no explanation in the Court's entry overruling the Motion to Certify as to the ground on which the decision was based.

It may therefore be presumed that the Motion was overruled on the ground that no error had intervened by reason of the judgment of the Court of Appeals to reverse and remand for new trial and that the case was not one of "public or great general interest" under Ohio Constitution, Article V, Section 2.

Five of the six Assignments of Error filed by Respondent in the Court of Appeals (and therefore in the record before the Ohio Supreme Court in its consideration of the Motion to Certify) were undeniably non-federal questions. Any one of these could have been the basis of the Supreme Court's decision to overrule the Motion to Certify, hence refusing to alter the Court of Appeals' decision to remand for a new trial. It must be presumed that the decision overruling the Motion rested on non-federal ground(s) and is not reviewable by this Court.

Klinger v. *Missouri*, 13 Wall. 257 (1871);
Murdock v. *Memphis*, 20 Wall. 590 (1875);
Block v. *Block*, 350 U. S. 808, 100 L. Ed. 725, 76 S. Ct. 74 (1955).

IV. Should This Court Agree with Petitioners' Position on the Writ and Merits, Respondent Should Be Permitted to Present to the Supreme Court of Ohio the Five Non-Federal Assignments of Error Urged in the Ohio Court of Appeals, But Not Yet Urged in the Supreme Court of Ohio Because Respondent Was Precluded from So Doing By Ohio Statutes and Rules of Practice of the Ohio Supreme Court.

A brief review of the procedural chronology in this case shows that after the Court of Common Pleas entered judg-

ment on the verdict for Petitioner, Respondent appealed to the Ohio Court of Appeals listing six Assignments of Error (set forth on p. 5, this Brief). Five of these Assignments were non-federal questions; only Assignment No. 3 involving the federal issue.

The Court of Appeals, basing its decision on Assignment No. 3 reversed the decision of the Trial Court and remanded the cause for a new trial (Pet. App. A, p. 7a).

Petitioner then filed a Motion to Certify in the Supreme Court of Ohio alleging three Assignments of Error, all of which were based on the applicability of the Federal Safety Appliance Act, and the Court of Appeals' decision with reference to that Act.

Respondent did not file a cross-appeal to the Supreme Court of Ohio at that time because the Statutes of Ohio and Rules of Practice of the Supreme Court of Ohio (*infra*) did not require Respondent to do so. Hence, while technically part of the Record of the case, the five non-federal Assignments of Error urged by Respondent in the Court of Appeals were not argued to the Supreme Court of Ohio in its determination of the Petitioner's Motion to Certify, which was based solely on the single federal question forming the basis of the Court of Appeals' decision.

Ohio Revised Code § *2505.22* provides:

> "Assignments of error may be filed on behalf of an appellee *which shall be passed upon by a reviewing court before a judgment or order is reversed in whole or in part.* The time within which assignments of error on behalf of an appellee may be filed shall be fixed by rule of court." (Emphasis added.)

Rule II, Section 2(B) of the Rules of Practice of the Supreme Court of Ohio, entitled "Appellee's Brief on Merits" provides:

> "It is . . . the duty of the appellee . . . to file . . . brief(s) . . . within Seventy Days after the docketing of the case in this Court. *Appellee may include in his brief his assignments of error, if any, as provided by Section 2505.22 of the Revised Code,* effective June 22, 1945. The Appellee's brief shall *include such reasons and authorities in support of his assignments of error* as he may desire as well as an answer to appellant's brief. . . ." (Emphasis added).

Should this Court determine that the Writ should issue and that the Court of Appeals of Ohio erred in reversing the decision of the Trial Court, it would, in effect be holding that the Supreme Court of Ohio likewise erred in overruling the Motion to Certify.

Had the Supreme Court of Ohio granted Petitioner's Motion to Certify, Respondent then would have had its opportunity to assign as errors the decision of the Court of Appeals that its five non-federal Assignments of Error were not well taken.

Since the Ohio Supreme Court overruled the Motion to Certify, Respondent could not file a brief on the Merits; and not until it had the opportunity to file its brief on the merits (See Rule II, Section 2B, Rules of Practice Supreme Court of Ohio, *supra*) could it assign the five non-federal errors and argue same with supporting authorities.

Ohio Revised Code § *2505.22* (*supra*) requires that *before a reviewing court reverses in whole or in part the judgment of a lower court,* the Appellee (Respondent in the Ohio Supreme Court) *must* be given an opportunity to file its assignments of error and the reviewing court must pass on these assignments.

See *Winslow* v. *The Ohio Bus Line Co.*, 148 Ohio St. 101 at 117; 73 N. E. (2d) 504 (1947);

In *Permanent Ins. Co.* v. *Cox*, 99 Ohio App. 389, 133 N. E. (2d) 627 (1955), in construing *R. C.* § *2505.22* the court holds at 99 Ohio App. 396:

"The reviewing court is required to pass on assignments of error filed by the appellee only when the judgment is reversed in whole or in part. This court, reversing the judgment of the trial court, is required to pass on appellee's assignments of error. Under R. C. § 2505.22 such assignments of error must be filed within the time fixed by rule of court . . . with which appellee has complied."

Since the Supreme Court of Ohio never permitted this cause to be heard on the merits, and since therefore Respondent has not yet been permitted to have reviewd by the Supreme Court of Ohio the adverse decision of the Court of Appeals as to Respondent's five non-federal, local questions of law, this Court, if it agrees with Petitioner on the merits, should permit Respondent to have "its day in court" by presenting for review before the Ohio Supreme Court the five non-federal issues. *This Court has repeatedly reversed and remanded to a lower court with instructions to consider those issues which the lower court, because of an erroneous determination of a dispositive federal question, felt it unnecessary to pass upon:*

Grant v. *A. B. Leach Co.*, 280 U. S. 351, 74 L. Ed. 470, 50 S. Ct. 107 (1929);
Lynerman v. *United States*, 303 U. S. 33, 82 L. Ed. 630, 58 S. Ct. 430 (1938);
Marconi Wireless Teleg. Co. v. *Simon*, 246 U. S. 46, 62 L. Ed. 568, 38 S. Ct. 275 (1918);
Fox v. *Gulf Refining Co.*, 295 U. S. 75, 79 L. Ed. 1311, 55 S. Ct. 641 (1935);
Indiana v. *Brand*, 303 U. S. 95, 82 L. Ed. 685, 58 S. Ct. 443 (1938);
Aetna Casualty & S. Co. v. *Flowers*, 330 U. S. 464, 91 L. Ed 1024, 67 S. Ct. 798 (1947);
Huddleston v. *Dwyer*, 322 U. S. 232, 88 L. Ed. 1246, 64 S. Ct. 1015 (1944);

Bank of America Nat. Trust & Sav. Assn. v. *Parnell*, 352 U. S. 29, 1 L. Ed. (2d) 93, 77 S. Ct. 119 (1956); *Calmar Steamship Corp.* v. *Scott*, 345 U. S. 427, 73 S. Ct. 739, 97 L. Ed. 1125 (1953).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 737

In the

Supreme Court of the United States

October Term, 1958

RALPH L. WRIGHT,

Petitioner,

vs.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, a Corporation,

Respondent.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I.

THE CAUSAL RELATION BETWEEN RESPONDENT'S VIOLATION OF THE SAFETY APPLIANCE ACT AND PETITIONER'S INJURIES WAS NOT TOO REMOTE TO BE SUBMITTED TO THE JURY.

Respondent claims that because the first effort to secure the replacement part for the broken coupler from a passing train was unsuccessful and that because 7 or 8 additional minutes passed before petitioner was ordered to go into the nose of the diesel to obtain the replacement knuckle and was thus injured, the chain of causation was broken. Apparently respondent would say that if petitioner had been ordered to get the replacement knuckle from the nose of the diesel immediately upon the breaking of the coupler

(a violation of the Safety Appliance Act) then the violation would be considered a "proximate" cause of the injury, but since the unsuccessful effort and a few additional minutes came first, the violation which would have been a perfectly good legal cause now became so remote that the jury could not be allowed even to consider it. The emergency caused by respondent's violation of the Act, viz: the defective brakes and broken coupler, persisted, and it was the sole reason that petitioner was ordered into the nose of the diesel for the replacement part. Surely the fact that petitioner was so ordered a few minutes later rather than a few minutes sooner cannot change a legally efficient cause into a non-causal irrelevancy.

The cases cited by respondent simply state that there must be negligence or a violation of the Safety Appliance Act which causes an employe's injuries to make the railroad liable. With this principle we of course have no quarrel. Respondent, however fails to recognize that under the recent decisions of this Court, cited in the Petition, if the negligence or violation "played any part, even the slightest in producing the injury" *it is for the jury not an appellate court* to determine whether the causal relation is sufficient.

As pointed out in the Petition for Certiorari, the character of the injury was definitely foreseeable from the violation, even though such foreseeability is not required (p. 16 Pet. for cert.). Obviously if a knuckle in a coupler is going to break, a replacement part will have to be obtained; if such parts are stored in the nose of the diesel, someone will have to go into the nose of the diesel to get the replacement knuckle, and if the nose of the diesel is unsafe, it is surely not only foreseeable, but even probable that if a coupler knuckle breaks, the person, such as petitioner here, who is sent for the replacement part may

very well get hurt. The foreseeability of a broken air hose's being held the cause of the employe who is procuring the replacement part falling off a trestle while so doing as in *New York N. H. & H. R. Co.* v. *Leary*, 204 F. (2d) 461 (1953 Cal) (*Cert. Den. 346 U.S. 856, 98 L.* ed. 370, 74 S. Ct. 71 (1953), or the foreseeability of a broken coupler's being held the cause of the employee who is repairing the same being hit by switched cars while so engaged as in *St. L. & Southwestern R. Co.* v. *Ferguson*, 182 F. (2d) 949 (1950 Ca8), surely makes foreseeability in the case at bar follow *a fortiori*.

II.

THE JUDGMENT BELOW HAD THE REQUISITE FINALITY TO JUSTIFY REVIEW BY THIS COURT ON CERTIORARI.

When the Ohio Court of Appeals with finality reversed and set aside the verdict and judgment for petitioner, even though it remanded the case for a new trial, its judgment, unless reversed by this Court, with fatal, permanent finality forever deprived petitioner of his cause of action for injuries due to violations of the Safety Appliance Act.

The Ohio Appellate Court specifically ruled that petitioner could not base a claim on violations of the Safety Appliance Act, and its ruling rested solely on that ground. That cause of action was completely removed from the case and the remand for a new trial did not permit that cause of action to be retried under any circumstances. The judgment thus with irrevocable finality (subject now only to review and reversal by this Court) took away from petitioner his cause of action for injuries due to violations of the Safety Appliance Act.

Granted that this Court will ordinarily not consider as final a judgment which simply grants a new trial and remands for further proceedings where in such new trial all causes of action are preserved to the litigants, this Court, however, takes a different view where the State Appellate Court has by its decision, considering the opinion together with the formal judgment, effectively removed a cause of action from or added a cause of action to such further proceedings.

Thus in *Johnson* v. *Muelberger*, 340 U.S. 581, 95 L.ed. 553, 71 S. Ct. 474 (1951), although the New York Appellate Court had reversed and remanded the case for further proceedings, since its decision had effectively subjected the petitioner to a cause of action on such remand, based on an erroneous view of the full faith and credit clause, this court held that the New York Appellate Court's decision was a *final* judgment, granted certiorari and reversed.

In *Pope* v. *Atlantic Coastline R. Co.*, 345 U.S. 379, 97 L.ed. 1094, 73 S. Ct. 749 (1953), the action of the Georgia Appellate Court in overruling a demurrer and remanding for further proceedings was nevertheless held a *final* judgment, as it effectively deprived petitioner of rights under F.E.L.A. Certiorari was granted and the Georgia Court reversed.

In none of the cases cited by respondent where this Court refused certiorari, had the plaintiff recovered a money judgment which was set aside or had the plaintiff been deprived of a cause of action.

In *Gospel Army* v. *City of Los Angeles, Calif.*, 331 U.S. 543, 91 L.ed. 1662, 67 S. Ct. 1428 (1947), this Court specifically stated that the California Appellate judgment under attack authorized plaintiff on the retrial to make and try to prove every point it claimed. There was plainly no deprivation of any cause of action by the state court decision.

In *Market St. Ry.* v. *R. R. Comm. of Calif.*, 324 U.S. 548, 89 L.ed. 1171, 65 S. Ct. 770 (1945), rehearing den. 324 U.S. 890, 89 L.ed. 1438, 65 S. Ct. 1020 (1945), the time at which a judgment became final was the point involved, not the character of the judgment.

In *South Pac. Co.* v. *Gileo et al.*, 351 U.S. 493, 100 L.ed. 1357 76 S. Ct. 952 (1956), there were five cases. In only *two* of the five cases was it held that certiorari should not have been granted for lack of finality of the judgment below, and in those *two* cases there *never had been any trial at all.* Significantly, in the other three cases where, in two of which the plaintiffs had recovered money judgments and in one non-suited, this Court did grant certiorari and on the merits sustained the plaintiff's position.

Since the Court of Appeals of Ohio by its judgment finally and irrevocably deprived petitioner of his cause of action for violations of the Safety Appliance Act, that judgment is sufficiently final to authorize this Court to grant Certiorari to review it.

III.

THE DECISION BELOW WAS NOT BASED ON ANY NON-FEDERAL GROUNDS, BUT WAS BASED SOLELY ON THE FEDERAL GROUNDS SET FORTH IN THE PETITION FOR CERTIORARI.

The Opinion of the Court of Appeals of Ohio speaks for itself. It is quoted verbatim beginning at p. 1a of the Petition for Certiorari. It shows that although respondent asserted six grounds of error, five of which were non-federal and one of which was federal, it specifically held all the non-federal assignments of error to be without merit and reversed solely on the applicability of Federal Safety Appliance Ace. The only question asserted, or argued on the

motion to certify to the Supreme Court of Ohio was this federal question.

No interpretation of motivation can be given the action of the Supreme Court of Ohio in overruling Petitioner's Motion to Certify. In overruling a motion to certify, the Ohio Supreme Court makes no decisions on any point raised, and no inferences can be drawn as to its views on any of them. *Swetland* v. *Evatt, Tax Com'r.*, 139 O.S. 6, 37 N.E.(2d) 601 (1941); *Hurless* v. *State*, 75 O.L. abs. 70 (1956). It simply declines to accept the case for review. Its decision is not a judgment, and for that reason the Writ of Certiorari from this Court, if one is granted in this case, should be directed to the Court of Appeals of Hamilton County, Ohio, and not to the Supreme Court of Ohio. *Western Union Telegraph Company* v. *Priester*, (1928) 276 U.S. 252, 72 L.ed. 555, 48 S. Ct. 234; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, Comptroller of Public Accounts, et al.*, (1954) 347 U.S. 159, 98 L.ed. 583, 74 S. Ct. 396.

The cases cited by respondent give no support to Respondent. Indeed in *Block* v. *Block*, 350 U.S. 808, 100 L.ed. 725, 76 S. Ct. 74, (1955) this Court did grant Certiorari and actually vacated the judgment of the Ohio Supreme Court on the federal ground involved, leaving it up to the State Court to clarify whether its decision rested on state or federal grounds. Respondent's point IV in its Brief make it plain that it recognizes that no non-federal questions were involved in the judgment below.

IV.

RESPONDENT'S REQUEST FOR PERMISSION TO ASSERT NON-FEDERAL GROUNDS TO THE SUPREME COURT OF OHIO AGAINST PETITIONER'S VERDICT IS PREMATURE.

As stated above, the Ohio Court of Appeals decided all non-federal points asserted by respondent against respondent. Respondent has requested that if this Court decides the federal questions sought to be reviewed here in favor of petitioner, then this Court should permit respondent to present to the Supreme Court of Ohio the non-federal grounds on which in the Court of Appeals it attacked petitioner's verdict, and on which the latter court decided against respondent. We submit that that request is premature at this time and would more properly be made on the merits.

This Court has plenary power on the merits, should it grant certiorari and decide the federal questions in favor of petitioner, to pass on the matters of state law desired to be raised by respondent as well, in order to dispose of the whole case without the necessity of still further proceedings in the state courts. At that time this Court can determine whether it wishes to decide itself the state law questions then sought to be raised by respondent, or to give respondent the opportunity to try to persuade the Supreme Court of Ohio to grant a motion to certify by respondent, or to consider respondent's claims on the state law questions already decided against respondent by the Court of Appeals, unworthy of further consideration.

PRAYER

For the foregoing reasons, together with those set forth in the Petition for a Writ of Certiorari, petitioner prays that a Writ of Certiorari issue directed to the Court of Appeals of Hamilton County, First Appellate District of Ohio, in this case, to the end that the judgment of that Court may be reviewed by this Court and reversed with directions that the judgment of the trial court should be affirmed.

Respectfully submitted.

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